IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

KEVIN MICHAEL MITCHELL, Appellant, v. WASHINGTON DEPARTMENT OF CORRECTIONS, Respondent.	No. 38767-1-II UNPUBLISHED OPINION

Bridgewater, J. – Kevin Michael Mitchell appeals the trial court's order granting sanctions to Mitchell following a show cause hearing on Mitchell's public records request to the Department of Corrections (Department). We hold that the trial court did not abuse its discretion in determining the amount of sanctions imposed against the Department. We affirm.

Facts

On May 2, 2007, Mitchell sent a letter to the public records coordinator at Stafford Creek Corrections Center, Sheri Izatt, asking to inspect his "written continuous chronological mail record." CP at 40. Mitchell further stated that the information he sought included the chronological mail record of items identified with him, and all documents, files, notes, memorandums, and e-mails pertaining to his mail records. He did not state the time period covered by the records request.

Izatt received Mitchell's request on May 7, 2007, and assigned it a tracking number, SCCC-947. Izatt responded by letter dated May 8, 2007, acknowledging Mitchell's request, and

explaining that under Department policy inmates could only directly inspect their own central file and medical file. Since the requested documents were not in those files, Mitchell could not inspect them, but he could designate a non-incarcerated person to inspect such documents. The letter informed Mitchell that he could appeal the denial of his request. Izatt also provided Mitchell with an appeal form and instructions on how to proceed with an appeal.

Mitchell replied in a letter to Izatt, dated May 23, 2007, and received by the Department on May 29, asking that the requested records be emailed to a designated non-incarcerated person. On May 29, 2007, Izatt sent Mitchell a letter asking him to specify the dates of the mail logs that he sought. Mitchell responded by letter, dated June 14, 2007, and received by the Department on June 19, 2007, stating that he wished to "amend" his request, and obtain "ALL mail log entries to include incoming, outgoing and legal mail from January 9, 2007 to the present date [of June 14, 2007]." CP at 50.

In a letter to Izatt dated July 1, 2007, Mitchell submitted a second records request, this time seeking records related to selected mail logs regarding interception of his mail by the Department's Intelligence and Investigations Unit (I&I), from January 10, 2007, through July 1, 2007. This letter was forwarded to the Department's Public Disclosure Unit in Olympia for processing. The letter arrived at the public disclosure unit in Olympia on July 9, 2007, where it was processed and responded to by a public disclosure specialist, Gaylene Schave. Schave assigned this request tracking number PDU-655, and so informed Mitchell in a letter on July 16, 2007, five business days after Schave received Mitchell's second records request. Schave also informed Mitchell that the records he sought could not be delivered as e-mail attachments as he requested, that she was gathering

copies of the requested mail logs, and that she would contact him within 15 business days.

Fifteen calendar days later, on July 31, 2007, Schave sent Mitchell a letter notifying him that there were two pages of incoming and outgoing mail logs responsive to his request, and that the copies would be mailed to him after the Department received payment for copying and postage. The letter also stated, "[There] are no documents responsive to the portion of your request for records of your mail going to the I&I Office, therefore none will be provided." CP at 56. The letter referenced only one tracking number, "PDU-655."[1] CP at 56.

By letter dated September 10, 2007, and received at the Department's Public Disclosure Unit on September 13, Mitchell asked the Department to search the I&I records again, "to be absolutely certain there is no log of mail being routed to the I&I office." CP at 58. Five business days after receiving his letter, Schave responded that although I&I stated that there are no responsive records, another search would be conducted. This letter also noted that two pages of responsive documents would be mailed to Mitchell upon receipt of payment.

Schave sent a follow up letter (dated September 27, 2007) to Mitchell stating that she checked with "all facilities I&I and mail room staff," and that there were no logs of I&I, mail room staff, or anyone else intercepting Mitchell's mail. CP at 60. The letter stated, "Since no documents exist *on this portion of your request*, none will be provided." CP at 60 (emphasis added). The letter reiterated that two pages of incoming and outgoing logs (responsive to

[1] Although this letter referenced only the tracking number linked to Mitchell's request for I&I intercepts, and noted no such documents existed, the letter's mention of two pages of available mail logs indicated that it also addressed Mitchell's earlier request for all mail logs, but simply failed to include the appropriate tracking number, SCCC-947, which designated Mitchell's prior request.

Mitchell's first request) had been collected and would be mailed to Mitchell upon receipt of payment.

On November 21, 2007, Mitchell remitted payment for the documents. Seven business days later, on November 30, 2007, Schave mailed to Mitchell two pages of incoming and outgoing mail logs showing activity from January through July of 2007.

On September 30, 2008, Mitchell moved for an order to show cause why he should not be awarded penalties for the Department's violations of the Public Records Act (PRA), alleging that the Department never responded to his request for documents under SCCC-947. The Department appeared and provided documentation that after paying for the records, Mitchell received the documents responsive to his amended first request. The Department's response included Schave's declaration, in which Schave averred that she was the public disclosure specialist who had written the unit's November 30 letter, which accompanied the two pages of mail logs, and all of the unit's previous letters to Mitchell that mentioned the two pages of available mail logs. Schave admitted that she inadvertently failed to include the tracking number SCCC-947 in each letter, although the two pages of mail logs addressed Mitchell's request designated by that tracking number. The two pages of mail logs in question included entries from January through July of 2007 and thus included the time period of both of Mitchell's requests, PDU-655 (January 10 through July 1 of 2007) and SCCC-947 (January 9 through June 14 of 2007). Schave also declared that there are no additional documents responsive to Mitchell's amended first request, SCCC-947.

The trial court ruled that although the Department had produced all responsive records to

request SCCC-947, the Department's response was untimely, and the Department's delay was 42 days. In setting a penalty for that delay, the court concluded that the Department acted in good faith and the delay constituted simple negligence. The court therefore ordered the Department to pay a penalty of $5.00 per day for 42 days, plus costs. Mitchell appealed.

Discussion

PRA[2]

Mitchell challenges the trial court's determination in two ways. He contends that the court erred in ruling that the Department provided all records regarding his SCCC-947 request, and that the court erred in its penalty determination. We disagree with both contentions.

We review questions of law concerning the proper application of the PRA de novo. *Yousoufian v. Office of Ron Sims*, 152 Wn.2d 421, 430, 98 P.3d 463 (2004); *Progressive Animal Welfare Soc'y v. Univ. of Wash.*, 125 Wn.2d 243, 252, 884 P.2d 592 (1994). We review a trial court's penalty determination under the PRA for an abuse of discretion. *Yousoufian*, 152 Wn.2d at 431.

The purpose of the PRA is to provide "full access to information concerning the conduct of government on every level . . . as a fundamental and necessary precondition to the sound governance of a free society." RCW 42.17.010(11). The public records portion of the act, RCW

[2] As a threshold matter, the Department contends that Mitchell's record requests were not properly submitted because they were not mailed to the Department's public records officer in Olympia, or emailed to the Department's public records unit, as required by WAC 137-08-090. But the Department relies on the current version of the WAC, as amended in 2008, which so provides. Mitchell's record requests at issue were submitted in 2007 and the version of the WAC in effect at that time required only that the record request be made in writing to the public disclosure coordinator so designated by each departmental administrative unit. *See* WAC 137-08-080; former WAC 137-08-090 (1982).

42.56.001-.902, requires all state and local agencies to disclose any public record upon request, unless it falls within certain specific enumerated exemptions. *Sperr v. City of Spokane*, 123 Wn. App. 132, 136, 96 P.3d 1012 (2004); *King County v. Sheehan*, 114 Wn. App. 325, 335, 57 P.3d 307 (2002); RCW 42.56.070(1). The requested record must be made available "for public inspection and copying." RCW 42.56.070(1). The Department of Corrections is an "agency" subject to the act's provisions. RCW 42.56.010(1) (defining agency to include every state department).

Public records subject to inspection under the act include (1) any writings (2) that contain information related to the "conduct of government or the performance of any governmental or proprietary function" and (3) that are "prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." RCW 42.56.010(2); RCW 42.17.020(42). However, an agency has "no duty to create or produce a record that is nonexistent." *Sperr*, 123 Wn. App. at 136-37 (citing *Smith v. Okanogan County*, 100 Wn. App. 7, 13-14, 994 P.2d 857 (2000)). Moreover, just as the act "does not provide 'a right to citizens to indiscriminately sift through an agency's files in search of records or information which cannot be reasonably identified or described to the agency,'" *Sperr*, 123 Wn. App. at 137 (quoting *Limstrom v. Ladenburg*, 136 Wn.2d 595, 605 n.3, 963 P.2d 869 (1998)), the act "does not authorize indiscriminate sifting through an agency's files by citizens searching for *records that have been demonstrated not to exist*." *Sperr*, 123 Wn. App. at 137 (emphasis added).

Mitchell's contention that the trial court erred in determining that the Department had produced all responsive documents pertaining to his SCCC-947 request is essentially a fact

inquiry. Mitchell contended to the trial court, as he does on appeal, that the Department never gave him any documents designated as responding to SCCC-947. And to the present time, he contends, the Department has failed to produce such documents. While it is true that the record contains no evidence that the Department provided Mitchell with any documents specifically labeled as responsive to the SCCC-947 tracking number, it is equally apparent that the two pages of mail log entries that the Department did provide Mitchell address the substance of the SCCC-947 request as amended in Mitchell's June 14, 2007, letter. As noted, Schave averred that the two pages of log entries regarding Mitchell's mail activity indeed addressed SCCC-947, but she inadvertently neglected to include that tracking number on her correspondence with Mitchell. A fair reading of the letters from Schave to Mitchell supports Schave's averment. The letters repeatedly state that there are no documents responsive to PDU-655, but at the same time indicate that two pages of responsive mail log entries will be mailed to Mitchell upon his payment of copying and postage. The discrepancy makes sense if the two pages of responses mentioned in the letters refer to a request for documents other than PDU-655.

Schave also averred that there are no additional documents responsive to SCCC-947, as amended in Mitchell's June 14, 2007, letter. Mitchell contends on appeal, as he did to the trial court, that there must be more documents. But he offers no evidence other than his own belief that more documents exist. The PRA's requirement to provide a specific exemption when *denying* a request for public documents applies to "the situation where the agency has the records but says, 'we are not going to give them to you' . . . [rather than where the agency says] 'we do not have these records.'" *Daines v. Spokane County*, 111 Wn. App. 342, 348, 44 P.3d 909

(2002). *See also Smith*, 100 Wn. App. at 13-14 (agency has no duty to create a record in response to a request; only existing records must be provided). Accordingly, there is "no agency action to review" under the PRA where the agency did not deny the requestor an opportunity to inspect or copy a public record, because the public record he sought "did not exist." *Sperr*, 123 Wn. App. at 137. *See also Kleven v. City of Des Moines*, 111 Wn. App. 284, 294, 44 P.3d 887 (2002) (no violation of the public disclosure act because the agency had "made available all that it could find"); *Smith*, 100 Wn. App. at 22 (when county had nothing to disclose, its failure to do so was proper). *See also Hangartner v. City of Seattle*, 151 Wn.2d 439, 447-48, 90 P.3d 26 (2004) (public disclosure act requires agencies to produce only identifiable public records). Here, the record supports the trial court's conclusion that the Department had fully responded to SCCC-947, and we so hold.

Sanctions

As noted, the trial court ruled that although the Department had fully responded to Mitchell's SCCC-947 request, its response was untimely, and thus the court imposed sanctions of $5 per day for each of the 42 days that the Department delayed in making the responsive mail logs available to Mitchell.[3] The court specifically noted that it was imposing a $5 per day penalty because the Department's actions were in good faith and constituted simple negligence. Mitchell contends that the Department acted in bad faith, the trial court's calculation of penalty days is incorrect, and the amount of penalties imposed is insufficient. We disagree with each contention.

[3] The sanction reflected the 42 calendar days between June 19, 2007, and July 31, 2007. The first date was when the Department received Mitchell's June 14, 2007, letter that amended his SCCC-947 request. The latter date was when Schave first notified Mitchell that two pages of responsive mail logs were available.

As noted, we review the trial court's penalty award for abuse of discretion. *Yousoufian*, 152 Wn.2d at 431. The PRA's penalty provision is intended to discourage improper denial of access to public records and provides:

> Any person who prevails against an agency in any action in the courts seeking the right to inspect or copy any public record or the right to receive a response to a public record request within a reasonable amount of time shall be awarded all costs, including reasonable attorney fees, incurred in connection with such legal action. In addition, it shall be within the discretion of the court to award such person an amount not less than five dollars and not to exceed one hundred dollars for each day that he or she was denied the right to inspect or copy said public record.

RCW 42.56.550(4) (formerly RCW 42.17.340(4) (2005)); *Yousoufian*, 152 Wn.2d at 429-30. Under this provision, the trial court has discretion to set the per day penalty between $5 and $100, but it *must* impose a penalty for each day that access is denied. *Yousoufian*, 152 Wn.2d at 437. Thus, the process for determining the appropriate PRA award requires two steps: (1) determining the amount of days the party was denied access and (2) determining the appropriate per day penalty between $5 and $100 depending on the agency's actions. *Yousoufian*, 152 Wn.2d at 438. The first step is a question of fact, and the second step lies within the trial court's discretion. *Yousoufian*, 152 Wn.2d at 439.

Here, the record supports the trial court's calculation of 42 days. Mitchell contends that because he has never received any record from the Department for SCCC-947, the calculation of PRA violation days is ongoing and thus the trial court's determination of 42 days is incorrect. This argument fails for the reasons discussed above, namely that the trial court correctly determined that the Department has fully responded to Mitchell's SCCC-947 request.

As for the proper determination of the per day penalty, the existence or absence of an agency's bad faith is the principal factor which the trial court must consider. *Yousoufian*, 152 Wn.2d at 435. In *Yousoufian*, our Supreme Court held that assessing a minimum penalty of $5 a day was unreasonable where the agency had acted with gross negligence. *Yousoufian*, 152 Wn.2d at 439.[4] Here, because the trial court found that the Department acted with good faith and simple negligence, we cannot say that the trial court abused its discretion in imposing a $5 per day penalty.

Mitchell contends that the Department acted in bad faith, alleging that the Department backdated its May 8, 2007, letter responding to Mitchell's initial request for documents. He points to a copy of a used Department envelope that is postmarked May 16, 2007, alleging that this proves both the backdating and the Department's bad faith. This is the same argument that he made to the trial court. The trial court also had Schave's declaration, which averred that Izatt responded to Mitchell's initial request on May 8, 2007. The trial court's ruling attests that the court found the Department's evidence more persuasive. Although the court did not make a separate finding that the Department's May 8 letter was not backdated, that determination necessarily inheres in the decision that the Department acted in good faith. *Cf. Marvik v. Winkelman*, 126 Wn. App. 655, 661-62, 109 P.3d 47 (2005) (generally, a fact inheres in the fact finder's decision if it relates to the effect of evidence or events upon the mind of the fact finder, or is directly associated with the fact finder's reasons, intent, motive, or belief, when reaching her

[4] Both parties rely on the multiple factors addressed in *Yousoufian v. Office of Sims*, 165 Wn.2d 439, 200 P.3d 232 (2009) (*Yousoufian IV*), but the mandate was recalled in that case by Supreme Court order dated June 12, 2009. The case was reargued on September 22, 2009, and a decision is pending. Accordingly, we do not address that case.

decision).

Mitchell also contends that the $5 per day penalty is insufficient, arguing that the backdating established bad faith, and the Department has never responded to the SCCC-947 request. As discussed above, Mitchell's contentions fail, and thus provide no basis for attacking the propriety of the trial court's exercise of discretion in setting the per day penalty amount. Thus, we hold that the trial court did not abuse its discretion in determining sanctions.

Attorney Fees

Mitchell seeks costs and statutory attorney fees for pursuing this appeal. As noted above the PRA's penalty provision provides for costs and fees to the prevailing party. *See* RCW 42.56.550(4). That provision also applies to appeals. *Progressive Animal Welfare Soc'y*, 125 Wn.2d at 271. But by its terms, the provision awards costs and fees to the *prevailing* party. Mitchell has not prevailed on appeal. Thus we decline to award him fees for this appeal.

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Bridgewater, J.

We concur:

Houghton, P.J.

Hunt, J.